Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LAWRENCE SUTTER,

Petitioner,

v.

STEVEN MARK LASAR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit upheld a contempt citation and other severe sanctions imposed against Lawrence Sutter, an attorney for Ford Motor Company, based on comments he made during his opening statement and an alleged omission in his *pro hac vice* application. The Ninth Circuit acknowledged that in imposing the sanctions under its "inherent power," the district court had denied Mr. Sutter the procedural protections afforded in a criminal contempt proceeding as well as the protections provided by the court's Local Rules, but held that the contempt was civil in nature and that the district court could rely on its inherent power even when the Local Rules were fully adequate to address the conduct in question.

The following questions are presented:

1. Whether a district court may rely on its inherent power to sanction where the conduct may be fully and adequately addressed under a sanctioning provision in a statute or rule.

2. Whether a contempt sanction is criminal, rather than civil, when it is based on completed conduct and intended to punish, stigmatize and reprimand the contemnor.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below included Steven Mark Lasar, Ford Motor Company, and Lawrence Sutter.

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PETITION FOR A WRIT OF CERTIORARI

Lawrence Sutter respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinion (Pet. App. 1a) is reported at 399 F.3d 1101. The opinion of the district court (Pet. App. 30a) is reported at 239 F. Supp. 2d 1032.

JURISDICTION

The Ninth Circuit filed its opinion on March 3, 2005, and denied petitioner's timely request for rehearing en banc on April 19, 2005. Pet. App. 84a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND RULES

The relevant provisions of the Local Rules for the District of Montana are reproduced in the Petitioner's Appendix, Pet. App. 86a-98a.

STATEMENT OF THE CASE

This case dramatically illustrates the dangers of a district court wielding an unchecked "inherent power" to sanction. Attorney Lawrence Sutter was accused of violating an order *in limine* during his opening statement and of omitting information in his *pro hac vice* application. Although the Montana Local Rules give extensive procedural protections to attorneys accused of omissions in their application, including the right to an independent investigation and prosecutor, the district court bypassed its own Local Rules by relying on its "inherent power" to sanction, stripping Mr. Sutter of his admission *pro hac vice*, and permanently banning him from ever again appearing in the Missoula Division of the federal court. The court also issued a contempt citation against him for the alleged violation of the order *in limine*, again relying on its inherent power and denying Mr. Sutter the procedural protections afforded a criminal contemnor. The court im-

posed these sanctions, as well as severe monetary sanctions, in a lengthy, published order attacking Mr. Sutter's character and his fitness as a lawyer. *See* 239 F. Supp. 2d 1032, Pet. App. 30a.

The Ninth Circuit vacated the permanent ban, but otherwise upheld the district court's order in full. 399 F.3d 1101, Pet. App. 1a. It held that the district court was entitled to jettison the procedural protections contained in its own Local Rules when sanctioning under its inherent power, thereby worsening an existing circuit split over whether a district court may invoke its inherent power when the conduct in question could be addressed by the sanctioning provisions in statutes or rules. *Id.* at 20a-21a. The Ninth Circuit also held that the contempt citation was civil in nature and thus did not require the protections that attach in a criminal proceeding, *id.* at 16a-18a, thus creating a conflict with the D.C. Circuit over whether this type of freestanding contempt citation based on a past failure to comply with a court order is civil or criminal.

* * *

1. Petitioner Lawrence Sutter represented Ford Motor Company in this product liability case tried before Judge Donald Molloy in the United States District Court for the District of Montana. Mr. Sutter is a nationally-known trial lawyer who has tried over 50 cases and recently founded his own 30-person firm based in Cleveland. Ninth Circuit Excerpts of Record ("ER") 93-94. He was selected in 2002 by the *National Law Journal* as one of the top 40 lawyers in the country under the age of 40, and was featured by the same publication in an article profiling ten of the country's top litigators. *Id.* He is a member in good standing of the bars of Ohio and Tennessee, and was admitted *pro hac vice* in this case. *Id.* at 94-95.

Respondent Steven Lasar was driving home late at night on a rural road in Montana when he lost control of his Ford Ranger pickup and rolled it over. Pet. App. 3a. He sued Ford, alleging that the Ranger's door latch was defective in

that it allowed the pickup's door to open during the rollover, resulting in his being thrown from the vehicle. *Id.* Prior to trial, respondent moved *in limine* to exclude evidence of his alcohol use the day of the accident. He also moved to exclude evidence that he was not wearing his seatbelt when the accident occurred. The district court granted both motions. *Id.*

During his opening statement, Mr. Sutter described how respondent spent the day of the accident:

> At about 5:00 that morning, Mr. Lasar got out of bed and went hunting for the morning. Some time in the afternoon, he met up with some of his friends and spent the day playing pool, visiting some local establishments. Somewhere around 10:00 that night, he made the decision to drive himself home. He got into his car and he began his way back to his homestead.

Pet. App. 4a. Later in his opening statement, Mr. Sutter described what was occurring within the vehicle during the rollovers:

> Now, inside the vehicle, something else was going on; Lasar was what we call a free-floating body. His body was banting about inside the car as it was rolling over. And because of what happens during the rollover, something all of us learned in high school and most of us tried to forget, centrifugal force. All that is, is something spinning around like a yo-yo on a string; it wants to keep going outward.

Id.

Respondent's counsel did not object during Mr. Sutter's opening statement. Rather, counsel waited until Mr. Sutter concluded, then requested a sidebar and later, at the end of the day's proceedings, argued to the court that these two remarks had violated the pretrial rulings. ER25-26. Respon-

dent's counsel did not request a mistrial, but simply asked "that the Court admonish counsel to stay within the letter and spirit of the Court's rulings and to avoid comments like that, and perhaps we can deal with some sort of instruction later on." *Id.* at 27.

Although respondent's counsel had not requested it, the court suggested *sua sponte* that it would grant a mistrial if respondent wished and would order Ford to pay his costs. ER27. The next morning, respondent accepted the court's invitation and the court immediately granted a mistrial. The court stated that it would impose sanctions, under its inherent power, to punish Mr. Sutter for attempting "to win this case at all costs," and directed all counsel to return to court two days later for a sanctions and contempt hearing. ER61-63.

2. When the court reconvened, the parties began by arguing over the proper amount of a monetary sanction. ER68-91. The court then stated that it would consider "whether or not Mr. Sutter should be held in contempt of the Court for the willful violation of the orders *in limine*." *Id.* at 91. Mr. Sutter was placed under oath and questioned by his co-counsel.

In the course of that questioning, Mr. Sutter volunteered that several years ago in a case called *Kaffeman*, a state trial judge in Ohio had ordered that he be briefly confined (once for 10 minutes and once for 20) for attempting to place objections on the record. ER94-95, 119. Mr. Sutter explained that the Ohio Supreme Court reviewed the trial judge's behavior and exonerated Mr. Sutter by agreeing that the trial judge had acted unreasonably and disqualifying her from further proceedings. *Id.* at 95. *See Kaffeman v. Maclin (In re Disqualification of Cleary)*, 723 N.E.2d 1106, 1108 (Ohio 2000). Mr. Sutter further noted that the Ohio Supreme Court subsequently suspended the state judge from the practice of law for misconduct while on the bench in an unrelated case. ER95.

Finally, he testified that he did not intend to violate either of the orders *in limine*, and that he did not believe he had

violated either order at the time he made his opening statement. ER98-100 ("I spent a great deal of time drafting this language because I thought that this was within the bounds of the Court's ruling. . . . I was trying to stay safely within the bounds of the ruling by the Court.").

Although *Kaffeman* had never been mentioned before Mr. Sutter raised it himself that morning, the district court revealed that it had already obtained and read the opinion. ER109.[1] The court agreed with Mr. Sutter that "[c]ertainly there's an implication from reading" the opinion "that the [Ohio Supreme] Court felt [the trial judge] should not have held you in contempt. . . . The inference is when she locked you up, she shouldn't have done it." *Id.* at 119, 123-24. But the court stated that it nonetheless believed that Mr. Sutter should have disclosed the Ohio proceedings in his *pro hac vice* application to the Montana court pursuant to Local Rule 83.3(e)(3)(E), which provides that an applicant must disclose:

> whether the attorney has ever been held in contempt, otherwise disciplined by any court for disobedience to its rules or orders, or sanctioned under Federal Rules of Civil Procedure 11 or 37(b), (c), (d) or (g) or their state equivalent.

Pet. App. 88a. The court acknowledged Mr. Sutter's belief that he had been vindicated by the Ohio Supreme Court, but stated that "I don't seem to read the case the way you do." ER118. The hearing ended and the court took the matter under advisement.

3. Nearly three months later, the district court issued an order citing Mr. Sutter for contempt, stripping him of his *pro hac vice* admission, and permanently banning him from ever again appearing in the Missoula Division of the District of

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[1] The court also revealed that it had researched and uncovered back issues of the *National Law Journal* in which Mr. Sutter had been quoted discussing his work in other cases involving seatbelt use. ER116-17.